

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

HOLMBERG ROOFING, INC. ¹

Employer

and

ALFREDO CAVALLERO, An Individual

Case 20-RD-2393

Petitioner

and

UNITED UNION OF ROOFERS, WATERPROOFERS
AND ALLIED WORKERS, LOCAL NO. 81, AFL-CIO ²

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial

¹ The Employer's name appears as amended at the hearing.

² The Union's name appears as amended at the hearing and as described in its collective-bargaining agreement with the Employer.

error and are hereby affirmed.³

2. Employer President Alan Holmberg testified that the Employer has a single facility located in Petaluma, California, and is engaged in the business of performing roofing, carpentry and sheet metal work. According to Holmberg, the Employer's primary work involves roofing new residential homes. Holmberg further testified that during the calendar year ending December 31, 2003, the Employer derived gross revenue in excess of \$1,000,000, and received goods and materials valued in excess of \$5,000 from points located outside the State of California. In these circumstances, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case .

3. The record reflects that since approximately October 2002, the Employer has recognized the Union as the collective-bargaining representative of its employees in the following unit: all roofing employees, including journeyman, apprentice and foreman roofers employed by the Employer and working out of its Petaluma County facility; excluding all other employees, guards and supervisors as defined in the Act. Holmberg testified that at that time, the Employer executed and agreed to be bound by the terms of the Working Agreement between the Union and the Associated Roofing Contractors of the Bay Area Counties, Inc., which is effective by its terms from August 1, 2000, to and

³ No representative of the Union appeared at the hearing. However, the record reflects that the petition and the notice of the hearing were served on the Union by first-class mail on June 1, 2004. The record also reflects that the order rescheduling the hearing from June 8 to June 14, 2004, was served by first-class mail on the Union and its attorney, David A. Rosenfeld, on June 7, 2004. The order rescheduling the hearing designated the correct time and address where the hearing was held. Finally, the record reflects that in a conversation ten minutes before the hearing commenced, Union Attorney Rosenfeld advised the hearing officer that he would not be appearing at the hearing. In these circumstances, I

including July 31, 2005 (the Agreement). The Agreement contains terms and conditions of employment for employees performing work covered by the Agreement, including wages and fringe benefits, a grievance/arbitration procedure, a no-strike and lock-out clause, and a dues check-off provision. In these circumstances, based on the Union's status as the representative of the employees performing work covered under the Agreement, I find that the Union is a labor organization within the meaning of the Act.

4. I find that no contract bar exists to an election in this case. At the outset, I note that contract bar is an affirmative defense which must be asserted by a party to a proceeding. *Roosevelt Memorial Park*, 187 NLRB 517 (1970). As noted above, although the Union and its attorney were timely served with notice of the hearing, no representative of the Union appeared at the hearing and no party has raised a contract bar defense in this case. Moreover, the record evidence establishes that the Agreement does not satisfy the requirements of the Board's contract bar rule to bar an election in this case. In this regard, the Board has long held that a contract having a fixed term of more than three years will operate to serve as a bar for only that portion of its term as does not exceed three years. *General Cable Corp.*, 139 NLRB 1123 (1962); *General Dynamics Corporation*, 175 NLRB 1035 (1935). The collective-bargaining agreement in this case is for a five year term and is effective for the period August 1, 2000, to and including July 31, 2005. The petition in this case was filed on May 28, 2004. Thus, at the time the petition was filed, the Agreement was in the fourth year of its five-year term. In these circumstances, the Agreement cannot serve to bar an election. In this regard, I note that the Agreement, as described above, is the basic agreement between the Employer and the Union that provides for the terms and conditions of employment of the employees whose representative status is at issue. Therefore its effective dates must be looked to in determining the existence of a contract bar. See *Tri-State Transportation Company, Inc.*,

find that the hearing officer did not commit prejudicial error by proceeding with the hearing without a representative of the Union being present.

179 NLRB 310 (1969); *Appalachian Shale Co.*, 121 NLRB 1160, 1164 (1958).

Accordingly, I decline to dismiss the petition based on the existence of a contract bar.

5. The unit petitioned for herein is consistent with the unit covered under the Agreement to which the Employer is signatory. Accordingly, I am directing an election in the following unit.

All full-time and regular part-time journeyman roofers, apprentice roofers and foreman roofers employed by the Employer at its Petaluma, California facility; excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION ⁴

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are all employees in the unit (1) if they have been employed for 30 working days or more within the twelve months preceding the eligibility date for the election, or (2) if they have had some employment in those twelve months and have been employed for 45

⁴ The record does not contain any evidence or state the parties' positions regarding the eligibility formula to be used for purposes of an election. Thus, the *Daniel* eligibility formula (as set forth in *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), which is generally applicable in all construction industry elections, will be applied in this case. In *Steiny and Company*, 308 NLRB 1323 (1992), the Board held that the *Daniel* formula is applicable to all construction industry elections -- regardless of whether the employer hires on a project-by-project basis or has a stable group of employees. As it is clear from the record that the Employer is a construction industry employer and the parties have not stipulated to the use of another formula, I find that the *Daniel* formula, as modified by *Steiny and Company*, is properly applied in this case.

working days or more within the twenty-four month period immediately preceding the eligibility date. Also eligible are employees engaged in an economic strike which commenced less than twelve months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period or prior to the completion of the last job for which they were employed, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than twelve months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **UNITED UNION OF ROOFERS, WATERPROOFERS AND ALLIED WORKERS, LOCAL NO. 81, AFL-CIO.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with *them*. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the names and addresses of all the eligible voters, shall be filed

by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Region 20 Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103-1735, on or before June 28, 2004. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington by July 6, 2004.

DATED at San Francisco, California, this 21st day of June, 2004.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735